
Nos. 16-1315 and 16-1340 (consol.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID SAXE PRODUCTIONS, LLC
and VEGAS! THE SHOW, LLC, a
single employer, and DAVID SAXE
PRODUCTIONS, LLC and FAB FOUR
LIVE, LLC, a single employer,

Petitioners,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Board Case Nos.:

NLRB-28CA084151

NLRB-28CA075461

**PETITIONERS' RESPONSE TO THE NATIONAL LABOR RELATIONS
BOARD PROPOSED JUDGMENT PURSUANT TO FRAP 19**

NOW COME petitioners, DAVID SAXE PRODUCTIONS, LLC, et al., by
their undersigned counsel, and pursuant to FRAP 19 state as follows:

1. The National Labor Relations Board filed its proposed judgment,
order, and notice to employees order in this matter on May 15, 2018.
2. Because this Court in its May 4, 2018 opinion vacated significant
portions of the Board's order and remanded this matter to the Board for further
consideration, petitioners submit that the entry of judgment and posting of a notice

to employees is premature and should not be done until after the Board has reconsidered its order in this matter and issued a new order pursuant to this Court's opinion of May 4, 2018 and after the resolution of any appeal to this Court from the Board's new order.

3. Additionally, it is possible that the Board's new order will require further posting. If petitioners are required to post an employee notice now, they could then be required to post a second notice for the same set of facts, which is not authorized under the National Labor Relations Act. This would also be prejudicial to petitioners because no dancer or other employee affiliated with the shows at issue now was so affiliated at the time of Ms. Carter's employment and contract non-renewal.

4. If this Court disagrees with paragraph 1, then petitioners request that their proposed judgment, order, and notice to employees (attached) be entered instead of those proposed by the Board for the following reasons.

5. The Board's proposed order does not conform to this Court's opinion of May 4, 2018 because it contains language prohibiting petitioners from "threatening employees with discharge for engaging in protected concerted activities" and "instructing employees that their failure to cease complaining about protected activity will result in the non-renewal of their employment contracts and thereby result in discharge." In its opinion of May 4, 2018, this Court vacated those

portions of the Board's order pertaining to petitioners' alleged violation of these rights and all allegations that employee Ann Carter was unlawfully discharged and ordered the Board to reconsider and clarify its treatment of the ALJ's credibility finding and petitioners' evidence that the contract decisions were not pretextual.

6. The Board's proposed notice to employees does not conform to this Court's opinion of May 4, 2018 in the following respects:

a. The notice states that it is posed pursuant to a judgment of this Court "enforcing" the Board's order in this matter. This Court "partially enforced" the Board's order; it did not enforce the entire order.

b. The notice refers to employees' rights to form, join, or assist a union and to choose a representative to bargain with the employer on their behalf. In its opinion of May 4, 2018, this Court vacated that portion of the Board's order pertaining to petitioners' alleged violation of these rights and remanded this issue to the Board for reconsideration.

c. The notice refers to employees' right to engage in protected concerted activities without threat of discharge or contract non-renewal. In its opinion of May 4, 2018, this Court vacated that portion of the Board's order pertaining petitioners' alleged violation of these rights and all allegations that employee Ann Carter was unlawfully discharged and/or that her contract was unlawfully non-renewed and ordered the Board to reconsider and clarify its

treatment of the ALJ's credibility finding and petitioners' evidence that the contract decisions were not pretextual.

d. The notice does not direct employees to this Court's May 4, 2018 opinion partially enforcing and partially vacating the Board's order, but rather directs employees only to the now substantially vacated Board order.

Respectfully submitted,

/s/ Melissa A. Murphy-Petros

Melissa A. Murphy-Petros

WILSON ELSER MOSKOWITZ EDELMAN &
DICKER LLP

55 West Monroe Street - Suite 3800

Chicago, Illinois 60603

Tel: (312) 704-0550

Fax: (312) 704-1522

Email: melissa.murphy-petros@wilsonelser.com

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JUDGMENT

Before: HENDERSON, ROGERS, and KAVANAUGH, Circuit Judges

THIS CAUSE came to be heard upon a petition filed by David Saxe Productions, LLC and Vegas! The Show, LLC and David Saxe Productions, LLC and Fab Four Live LLC to review an Order of the National Labor Relations Board dated August 26, 2016 in Case Nos. 28-CA-075461 and 28-CA-084151, reported at 364 NLRB No. 100, and upon a cross-application for enforcement filed by the National Labor Relations Board to enforce said Order. The Court heard argument of the parties and has considered the briefs and agency record filed in this cause. On May 4, 2018, the Court, being fully advised in the premises, handed down its opinion granting in part the petition of David Saxe Productions, LLC and Vegas! The Show, LLC and David Saxe Productions, LLC and Fab Four Live LLC and

granting in part the Board's cross-petition for enforcement. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that David Saxe Productions, LLC and Vegas! The Show, LLC and David Saxe Productions, LLC and Fab Four Live LLC, its officers, agents, successors, and assigns shall abide by said order (see attached order and appendix).

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

ENTERED:

DAVID SAXE PRODUCTIONS, LLC AND VEGAS! THE SHOW, LLC, AND
DAVID SAXE PRODUCTIONS, LLC AND FAB FOUR LIVE, LLC

v.

NATIONAL LABOR RELATIONS BOARD

ORDER

David Saxe Productions, LLC and Vegas! The Show, LLC and David Saxe Productions, LLC and Fab Four Live, LLC, Las Vegas, Nevada, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

- (a) Prohibiting employees from engaging in protected concerted activities;
- (b) Disparaging employees for engaging in protected concerted activities;
- (c) Threatening employees with unspecified reprisals because they engaged in protected concerted activities; and
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

- (a) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent in question customarily communicates with its employees by such

means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If any Respondent has gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by that Respondent at any time since September 27, 2011.

- (b) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official of each respective Respondent on a form provided by the Region attesting to the steps that that Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS
PARTIALLY ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD,
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Act together with other employees for your benefit and protection, and
Choose not to engage in this protected activity.

WE WILL NOT prohibit you from engaging in protected concerted activities.

WE WILL NOT disparage you for engaging in protected concerted activities.

WE WILL NOT threaten you with unspecified reprisals because you engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

DAVID SAXE PRODUCTIONS, LLC AND VEGAS! THE SHOW, LLC AND DAVID SAXE
PRODUCTIONS, LLC AND FAB FOUR LIVE, LLC, SINGLE EMPLOYER

The Board's order and the decision of the United States Court of Appeals for the District of Columbia partially vacating and partially enforcing the Board's order can be found at www.nlr.gov/case/28-CA-075461 or by using the QR code below. Alternatively, you can obtain copies of these documents from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington D.C. 20570, or by calling (202) 273-1940.

[QR CODE]

CERTIFICATE OF SERVICE

I certify that on May 22, 2018, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Melissa A. Murphy-Petros

Melissa A. Murphy-Petros

WILSON ELSEER MOSKOWITZ EDELMAN &
DICKER LLP

55 West Monroe Street - Suite 3800F

Chicago, Illinois 60603

Tel: (312) 704-0550

Fax: (312) 704-1522

Email: melissa.murphy-petros@wilsonelser.com

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 707 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Office Version 2003 and 14-point Times New Roman type style.

/s/ Melissa A. Murphy-Petros

By: _____

Melissa A. Murphy-Petros
WILSON ELSEER MOSKOWITZ EDELMAN &
DICKER LLP

May 22, 2018